Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

GLORIA CAUDILLO,

Petitioner,

v.

CONTINENTAL BANK/BANK OF AMERICA ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court should establish a uniform, definitive rule with specific elements for when an employer will be liable for a discriminatory environment that is otherwise actionable in accord with *Faragher v. City of Boca Raton*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gloria Caudillo, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Untied States Court of Appeals for the Seventh Circuit entered into this proceeding on July 26, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Caudillo v. Continental Bank/ Bank of America Illinois,* (98-3032, July 26, 1999) is not reported, but can be found at 1998 U.S. Dist. LEXIS 11022. (Appendix A)

The opinion of the district court in Caudillo *v. Continental Bank/Bank of America Illinois,* No. 97 C 884, is not reported but can be found at 1999 U.S. App. LEXIS 17915 (N.D. Ill. July 16, 1998). (Appendix B)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on July 26, 1999.

CONSTITUTIONAL PROVISION

The Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-2(a)(1)(2) appear in Appendix C.

STATEMENT OF THE CASE

The Petitioner, a 53 year old woman from Chicago, was employed at Continental Bank (also located in Chicago) since 1980. After being initially hired as a word processor at the Bank, Petitioner was later promoted to Senior Correspondence Specialist in January of 1982. In 1987, Petitioner was transferred from the commercial banking support services department to the printing and graphics department as a word processor operator. Four years later, in 1991, Petitioner was again promoted, this time as a "PC word processing specialist." Her duties at that time involved performing graphic design functions such as preparation of name tags, place cards, table tents, labels and buttons, Bank bulletin lay outs, bank ads, internal correspondence, charts, company presentation covers; nearly everything in the bank's use of what could be described as a graphic design division or department. Petitioner was trained and received certificates in graphic design software, including computer programs such as the commercially popular programs known as Freelance, Ventura, PageMaker, and Coreldraw. Training in these programs was completed during the time period covering 1989 through 1993.

In early 1993, the Bank moved the Graphics Services employees to another facility at 200 West Jackson Street in Downtown Chicago ("Jackson facility"). The manager of the Graphic Services Division there was Mr. William Gillespie ("Gillespie"); there was also a "unit manager," Mr. Ronald Neff, ("Neff"); and an Art Director at this facility, Ms. Sabrina Mazer ("Mazer"). There were approximately fifteen Graphic Service Operators at the Jackson facility department, which worked closely with

the Bank's Publishing Center located at 231 South LaSalle Street ("LaSalle Building"), the main office for the bank. The Publishing Center provides electronic imaging, proposal construction, laminating, duplicating, collated binding, document preparation for flyers, brochures, newsletters, memo pads and the like, for the Bank. About 30% to 40% of the Publishing Center's work comes from Graphic Services. The Publishing Center employs approximately twelve operators and two work coordinators, Mr. Chester Wrice and Mr. Charles Mabry ("Mabry"). From 1993 onward, Petitioner received her assignments from a "team leader," Ms. Renette Pleasant ("Pleasant"), who in turn reported to Mazer. The chain of command then went from Mazer to Neff to Gillespie. For example, after an operator completes a project she takes it to the Publishing Center for final processing. Petitioner and all the other operators had to follow up with the Publishing Center to make sure that the work was completed correctly and on a timely basis.

The sexual harassment Petitioner claims victim to encompasses a three-year period. Beginning in the summer of 1991, Petitioner alleges that Mabry asked her out on a date. Petitioner refused, and actionable sexual harassment by Mabry followed until her termination in 1995. Petitioner asserts that Mabry first came over to her cubicle and stared at her in a sexual manner, creating a hostile work environment. At least three other instances of Mabry approaching the Petitioner's cubicle and staring at her in this fashion followed from 1991 to 1995. Petitioner also alleges that she was stalked by Mabry in the workplace, who also made sexually connotative comments in front of co-workers and supervisors. In

one incident, Petitioner alleges that in April of 1994, Petitioner stepped into an empty elevator when she saw Mabry standing at the door of the elevator, staring at her in a "threatening and intimidating manner." There were also allegations of actual physical harassment. Petitioner states that on numerous occasions, Mabry approached Petitioner from behind, touching her hair, arms and body; then without saying a word, would walk away. In January of 1992, Petitioner alleges that while bending down to place files in a cabinet, someone called Petitioner's name. Turning around to see who had called her, she saw Mabry standing directly behind her. Mabry then took a flash photograph of the Petitioner. After being confronted by Petitioner, Mabry responded that he was "joking" and further stated that there was no film in the camera. About three weeks later, however, Petitioner was approached by Mabry at Petitioner's cubicle wherein Mabry presented a photograph of Petitioner bending over. Petitioner immediately took said photograph from Mabry and told Mabry to leave her alone. In another alleged incident, Petitioner states that she was standing at a counter when Mabry again came up behind her and touched her hair and shoulder. Then Mabry, according to Petitioner, later approached her from behind again and rubbed his body against hers. In yet another physical encounter, Petitioner claims that in April of 1993, Mabry grabbed Petitioner's arm and fondled one of her breasts. In what now became a shockingly familiar pattern, Mabry allegedly approached Petitioner while she was at her cubicle, stared at her for a number of minutes, then left. There were also allegations of sexual harassment against Petitioner by Mabry in public. In June of 1993, Petitioner was at a festival in front of the

LaSalle bank location, when according to Petitioner, she suddenly felt an arm placed on her shoulders and a hand move down and touch one of her breasts. Not surprisingly, Petitioner claims this assault was done by Mabry as well. In another public incident, this one on the Bank's premises in October of 1993, Petitioner states Mabry approached her cubicle and stated loudly, in front of other co-workers, that "Gloria and I went out." That same month, Petitioner walked into to the Bank's video room, where Mabry and Gillespie were present. Mabry then allegedly said in front of Petitioner, "Whenever Gloria goes to Publishing Center she lets you know don't fuck with me." Part of this incident allegedly occurred in the presence of co-workers. The next month, in November of 1993, Petitioner was at her desk and in the presence of Pleasant, Mabry said loudly, "Gloria why don't you get married." About a month later, after Petitioner asked Mabry to stop the harassment, Petitioner was standing at her desk when suddenly she felt the penis of a man rubbing against her buttocks. According to Petitioner, she turned around and saw Mabry. Once again, Mabry stared at her and left. Petitioner claims that the culminating effect of all these incidents has left her humiliated and permanently injured as a result of this alleged torment. The harassment continued and on February 25, 1994. Petitioner again asked Mabry to leave her alone. According to Petitioner, Mabry became angry and said loudly that she was negligent and did not perform her work properly. In response, Petitioner reported Mabry's behavior to Gillespie who acted by simply informing Petitioner that Mabry was just trying to "intimidate" her. Now that Gillespie had been informed of Mabry's alleged conduct, in approx-

imately April of that year, Petitioner walked into a room with Gillespie and Mabry said to her "did you get lucky." This remark to Petitioner was also made in the presence of co-workers Cheryl Conway and Andrew Prangley.

According to Petitioner, the working environment became so hostile and intimidating that she decided to report Mabry's sexual harassment to her supervisor, Neff on March 28, 1994. Petitioner told Neff that she had been continually sexually harassed by Mabry. Petitioner informed Neff that the harassment included constant unwanted remarks, stalking, pervasive sexual stares, physical touching of her body, fondling one of her breasts, and Mabry rubbing the front of his lower body against her buttocks. Petitioner also advised Neff that she had spoken to Mabry at least two times previous and asked him to leave her alone. Neff informed Petitioner that he would discuss these allegations with Hayes, the assistant manager and supervisor of Mabry. On March 29, 1994 after Petitioner met with Hayes and Neff, Hayes informed Petitioner that he would restrict Mabry from approaching her cubicle. About a week later, on April 4, 1994, Neff then met with Gillespie and Petitioner, who said the he (Neff) would also temporarily prohibit Mabry from approaching Petitioner's cubicle.

Management took no other action. As such, Petitioner subsequently contacted Doris Walters ("Walters"), a human resources representative at the Bank. On two separate occasions, first on April 8, 1994 then on April 18, 1994, Petitioner informed Walters of Mabry's alleged sexual harassment and that other incidents also had been reported to Neff, Hayes and Gillespie. Petitioner informed Walters of both workplace incidents and the

alleged stalking incidents occurring outside the workplace on April 15, 1994, after their meeting. During a third meeting on April 27, 1994, Petitioner also told Walters that Mabry had violated Gillespie's restrictions and that she believed nothing was ever said to Mabry concerning her reports of sexual harassment. After no other action was taken by her employer, Petitioner began to document her victimization:

> —On June 14, 1994 a letter complaining of sexual harassment was given to Linda Stephenson of the Bank's human resources department;
>
> —In September of 1994, another letter complaining of sexual harassment was given to Linda Stephenson;
>
> —On November 18, 1994 a letter to Linda Impastato complaining of sexual harassment was sent by Petitioner;
>
> —On January 29, 1995 another letter complaining of sexual harassment was sent to Linda Impastato;
>
> —On February 10, 1995 a third letter was sent by Petitioner to Linda Impastato, again complaining of sexual harassment; and
>
> —On March 25, 1995 a letter written by Petitioner was given to Neff, again complaining of incidents of sexual harassment against her by Mabry.

When Stephenson did confront Mabry with Petitioner's allegations of sexual harassment, Mabry denied them all. Stephenson did, however, instruct Mabry to avoid Petitioner. Petitioner was then transferred to another position. On September 14, 1994, Petitioner expressed to Impastato her interest in the position of loan account representative or administrative assistant. Walters advised Petitioner that the loan account position was

closed but she could however, be transferred to the same building as Mabry as an administrative assistant. Petitioner refused this offer and applied for a position as senior secretary. Petitioner was told on December 13, 1994, however, that the position was closed. Petitioner then was offered to return to the job that she had started in 1980 as a word processor; a demotion that she refused.

On September 9, 1994 Impastato told Petitioner that she could move her desk into Pleasant's cubicle, an employer who worked closely with Mabry. She suggested placement near another co-worker, far away from Mabry. Instead, she was placed in a cubicle far away from everyone, in the last cubicle in the department, thus isolated from every co-worker in the office.

From 1980 until complaints of sexual harassment were made to management, Petitioner's work performance evaluations were all above average or average. In 1986 and 1987, her appraisals stated that she was "able to grasp and solve most situations with little or no assistance" and that she was a very good team worker. In 1988 she was transferred to the graphics and publishing services department and her appraisal documented "average performance." In 1991 Petitioner was promoted to a PC Specialist and received a merit increase and a promotion increase in salary. She was later given a difficult company assignment and received a commendation letter for her performance concerning that assignment. From 1991 to 1994, Petitioner's appraisals, signed off by Neff and Gillespie, were all average or above average. In the 1994 appraisal she received an "exceptional average" rating, documenting that "Gloria is currently best suited in her current position," recommending a salary increase.

No complaints were ever received about her performance during this time period. In fact, Petitioner received commendation letters from customers from 1994 through 1995. Appraisals continued to support an average or above job performance during this time as well, noting that Petitioner's strengths were in part that she did not shy away from complicated designs and produced time-sensitive complex charts. To keep track of employee work performance, the Bank had in place certain policies and practices regarding the appraisal process for its employees. There is no question that Petitioner's 1994 appraisal, signed by Mazer who was not her supervisor, was not in accord with the company's written policy, all of which is documented, in the lower court proceedings. On August 28, 1995 Petitioner was discharged. Petitioner subsequently complained to Bank human resources of retaliation, the first in April of 1994. Then she filed EEOC charges against the Bank on June 14, 1994. In her first derogatory performance report signed by Mazer after complaining of Mabry sexual harassment to human resources, Petitioner's next appraisal accused her of lack of organization, poor communication, and lack of ability, all of which were in stark contrast to her appraisals she received the previous thirteen years at the Bank.

After receiving a right to sue letter, Petitioner filed a complaint in federal district court against the Bank on February 7, 1997 stating that the Bank was liable for sexual harassment committed by Mabry and also claiming that the Bank had fired her in retaliation for bringing claims of sexual harassment by Mabry.

The district court then dismissed in its entirety, the Petitioner's complaint after the Bank filed a motion for

summary judgment, ruling that there was no genuine issue of material fact to go further with the case.

On appeal, the Seventh Circuit Court of Appeals, despite making a passing reference to this Court's decision in *Faragher v. City of Boca Raton,* affirmed the district court's decision despite stating that:

> [W]e pause to note our strong disapproval of the type of workplace behavior allegedly exhibited by Mabry and our grave reservations about the Bank's suggestions that Mabry's conduct did not constitute actionable harassment . . . .

Nevertheless, the Seventh Circuit, despite acknowledging sexual harassment in the workplace or at a minimum refuting the Bank's suggestion that Mabry did not harass Petitioner, found that the Bank "fulfilled its duty with respect to remedial actions" and therefore affirmed the district court's decision. The Seventh Circuit relied, in part, on the rationale that the Bank did whatever they could have done to relieve it of any liability:

> [W]e note that the Bank's actions did prove effective; Mabry stopped touching and making sexual comments to Ms. Caudillo. When Ms. Caudillo complained that Mabry was still bothering her by looking at her in a sexual and threatening manner, the Bank took further steps to alleviate her discomfort. The Bank reassigned Ms. Caudillo to a cubicle that would minimize her contact with Mabry and also arranged to have a manager escort him whenever he needed to see her for business purposes. These efforts, we conclude, were reasonably calculated under the circumstances to prevent any further harassment.

In ruling that the bank's total response was reasonable, the Court of Appeals merely noted that management

"also warned Mabry that any further questionable behavior would result in employment consequences" and in fact gave "Ms. Caudillo a two-week paid vacation and offered to let her transfer to another position if she thought it would help." In the same breath as saying it would have difficulty believing the Bank that Mabry's conduct was not actionable sexual harassment, it nevertheless concluded the Bank did no wrong. It simply christened the Bank's acknowledgment that sexual harassment was taking place, holding that the remedial measures doctrine, apparently by its mere invocation, serves as an absolute bar to employer liability.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW DEMONSTRATES THAT LOWER COURTS ARE NOT ABLE TO FOLLOW *FARAGHER* DESPITE ACKNOWLEDGING SEXUAL HARASSMENT TAKING PLACE IN THE WORK PLACE. THIS COURT SHOULD SET FORTH WHAT REMEDIAL MEASURES SHOULD BE TAKEN BY EMPLOYERS SO THAT *FARAGHER* CAN BE FOLLOWED AND NOT BE PAID A HOLLOW HOMAGE.

The prohibition of an individual from maintaining a Title VII sexual harassment action against an employer because employers across the nation can now use this Court's recent decision is *Faragher* as a shield rather that a sword for the sexually harassed employee is inconsistent with the remedial purpose of the Civil Rights Act of 1964. Lower courts need a specific definition of what are remedial measures in order to follow *Faragher v. City of Boca Raton*.

A. Employers Misapply, And Lower Courts Allow, The Remedial Measures Doctrine In Title VII Cases Using It As A Shield Rather Than A Sword.

There is presently a conflict among the United States Circuit Courts as to what constitutes remedial measures taken by employers to provide a defense to liability from employees who are unquestionably sexually harassed in the workplace. There are cases in the lower courts being summarily dismissed where acknowledgment of sexual harassment is taking place, yet lower courts feel their hands are tied and must simply follow a test absent any rule or guidelines constituting what makes up remedial measures. The rights of employees who suffer sexual harassment in the workplace now find employers cloaked in an undefined, remedial measures defense which lower courts rely on in disposing of actions where there is no question that sexual harassment occurred. This was not this Court's intention when deciding *Faragher.* Title VII has long been recognized as a "remedial statute with a broad sweep." *Pullman-Standard v. Swint,* 456 U.S. 275, 276, 102 S.Ct. 1781, 72 L.Ed.2d 64 (1982). This Court previously stated that the Congressional objective of Title VII is to achieve equality of employment opportunities. *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). "Where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood,* 327 U.S. 678, 674, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

B. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings in *Faragher v. City of Boca Raton* And Prevents Proper Implementation of This Court's Opinion In Other Circuits.

Prior to Petitioner's case, the Seventh Circuit liberally construed Title VII "in keeping with its remedial purpose." *Verpinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996), (*citing Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986), as evidence of its generous construction in title VII actions.). The Seventh Circuit previously followed certain general paths in determining whether an employer had responded adequately to an employee's complaint of sexual harassment by a co-worker established in *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d, 473 (7th Cir. 1996), stating that:

> If an employer takes reasonable steps to discover and rectify the harassment of its employees, however, it has discharged its legal *duty*. *Bakerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). 'An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further instances of employee harassment under the particular facts and circumstances of the case at the time the allegations are made.' *Brooms*, 881 F.2d at 421. We are not to focus 'solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed.' *Id*. The reasonableness of an employer's response depends, in part, on the gravity of the harassment alleged. *Bakerville*, 50 F.3d at 432.

As this Court recently has already noted in *Faragher*:

> Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment perpetrated by supervisory employees. While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted different approaches. Compare, e.g., *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (CAIO 1997), cert. pending, No. 97-232; III F.3d 1530 (CAII 1997) (case below); *Gary v. Long*, 313 U.S. App. D.C. 403, 59 F.3d 1391 (CADC), cert. denied, 516 U.S. 1011, 133 L.Ed. 2d 493 (1995); and *Karibian v. Colombia University*, 14 F. 3d 773 (CA2), cert. denied, 512 U.S. 1213, 129 L.Ed.2d 824, 114 S.Ct. 2693 (1994), We granted certiorari to address the divergence, 522 U.S. (1997), and now reverse the judgment of the Eleventh Circuit and remand for entry of judgment in Faragher's favor.

It is evident that Courts of Appeals, despite acknowledging actionable conduct on the part of supervisory employees, are nevertheless affirming dismissals of district court cases, like Petitioner's case, because the employer simply asserts that it was aware of sexual harassment complaints. In recognition that lower courts are left to carve out there own standard, this court has noted that "our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive." *Faragher* at 27. This Court has further eluded to addressing this issue in acknowledging that "[g]iven the circumstances of many of the litigated cases, including some that have come to us, it is not surprising that in many of them, the issue has been joined over the suffi-

ciency of the abusive conditions, not the standards for determining an employer's liability for them." *Id.* at 789. It is time for this Court to clarify some of the exact steps an employer should take prior to successfully asserting the common law remedial measures defense thus avoiding liability. Lower courts have not taken this Court's prior admonishments in defining what exactly are reasonable remedial measures.

II.

LOWER COURTS SHOULD FOLLOW SPECIFIC COMMON LAW PRINCIPLES ALREADY ELUDED TO, BUT NOT ESTABLISHED, BY THIS COURT FOR DETERMINING WHETHER AN EMPLOYER TOOK REASONABLE REMEDIAL MEASURES IN RESPONSE TO ACTIONABLE SEXUAL HARASSMENT.

When examining common law agency principles as applied to Title VII sexual harassment cases, the employer should first and foremost have in place the following:

> *A proven, effective mechanism for reporting and resolving complaints of sexual harassment, available without undue risk or expense to the employee complaining of sexual harassment, subject to proof by the employer by a preponderance of evidence.*

This is a new, more effective standard which should be adopted by this Court. The employer should demonstrate that it has utilized this mechanism previously or in cases of first time complaints of sexual harassment in the workplace, it should be well known. A standard should be in place: *The employer must demonstrate that the mechanism used is widely known, accepted and has been proven*

successful in the workplace. So called mechanisms like offers to transfer the employee to a demoted position, transferring the employee into the same office building as the alleged harasser, or relocating the employee into an isolated area, away from co-workers would not be acceptable as valid defenses to taking "remedial measures." Thus the employer could not escape liability simply by documenting the alleged sexual harassment, or writing letters to the employee-victim acknowledging the same and soliciting offers to resolve the problem. This also was done in Petitioner's case. It now apparently has relieved the employer from any actionable conduct by a supervisory employee (acknowledged by the Court of Appeals) simply because the employer documented the harassment and took superficial actions to insulate it from liability. Neither Congress nor this Court intended Title VII and *Faragher* to do that.

When looking at the facts of the case and the remedial measure that should have been undertaken, in the same light as this Court has said "Poor Joshua" so too should this court say, "Poor Gloria." There will be many other Glorias, as various Courts of Appeals continue to allow the employer simply to document the alleged sexual harassment, offering hollow remedial measures such as writing letters to the employee-victim with no expectation of proven success or definitive guidelines to follow. Such gross harassment, like that suffered by the Petitioner, will go unchecked and most likely will continue to get worse. Millions of employees will be detrimentally affected by the absence of an established rule setting forth what measures are reasonable and acceptable. This Court has previously stated that "[i]t is by now well

recognized that hostile environment sexual harassment by supervisors (and, for that matter, coemployees) is a persistent problem in the workplace." *Id.* at 798 *citing Lindemann & Kadue* 4-5 (discussing studies showing prevalence of sexual harassment). The Seventh Circuit's failure to address these issues departs from this Court's previous decision in *Faragher;* it is violative of Title VII and this Court's path for dealing with an employer's response to sexual harassment in the workplace. As such, it warrants review from this Court.

CONCLUSION

For the reasons contained herein, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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